RECENT DECISIONS.

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ADVERSE POSSESSION—CLAIM OF RIGHT—MISTAKE AS TO BOUNDARY.—The defendant through a mistake in locating his boundary unintentionally occupied land of the plaintiff's along with his own for the statutory period. The plaintiff brought ejectment. *Held,* the defendant's possession was adverse. *McCormick et al.* v. *Sorenson et ux.* (Wash. 1910) 107 Pac. 1055.

On the question as to whether such possession as that in the principal case is adverse the courts are squarely in conflict. Washburn, Real Property (6th ed.) § 1969. Some courts hold that the intention must be to claim title to the given line at all events, and not merely because of the belief that such line is the true one, *McCabe* v. *Bruere* (1899) 153 Mo. 1, and interpret unexplained possession by mistake as proceeding from the latter belief, *Brown* v. *Cockerell* (1858) 33 Ala. 38, or as being presumably under the title of the true owner. *Preble* v. *Maine Central R. R. Co.* (1893) 85 Me. 260. The distinction between these two forms of intention, especially where no doubts of the validity of his claim have arisen in the mind of the occupant, seems intangible and difficult to arrive at. Further, the result reached, that one in possession by mistake intends to claim only to the true boundary, wherever it may be, seems arbitrary and contrary to the normal inference arising from open exclusive possession. Since adverse possession is occupancy under claim of freehold, however such claim arises, *Dyer* v. *Eldridge* (1893) 136 Ind. 654, one who occupies his own and adjoining land under the same claim of right should be deemed to hold adversely. Accordingly, a number of courts have taken the view that the motives from which the intention to claim title arises are immaterial, *Green* v. *Anglemire* (1899) 77 Mich. 168, and that one who occupies the land as his own is in adverse possession, regardless of his knowledge or ignorance of a paramount title. *Metcalf* v. *McCutchen* (1882) 16 Miss. 145. This doctrine, following the fundamental rule that possession is the best evidence of intention, avoids the uncertainty of an inquiry into the occupant's mental state, *Pearce* v. *French* (1831) 8 Conn. 439, and does not favor the wilful wrongdoer at the expense of the innocent disseisor. It also seems more in accord with the object of the Statute of Limitations as a statute of repose. *Green* v. *Anglemire supra.* The court in the principal case has adopted the better view of the effect of possession under a mistake as to the location of the boundary.

CONSTITUTIONAL LAW—DUE PROCESS—POWER TO STRIKE OUT ANSWER OF ONE IN CONTEMPT.—In a suit for divorce the defendant was ordered to pay temporary alimony. Upon his failure to do so, he was adjudged in contempt and his answer stricken out. *Held,* upon appeal, the order striking out his answer was unconstitutional as denying due process of law. *McNamara* v. *McNamara* (Neb. 1910) 126 N. W. 94. See Notes, p. 661.

CONSTITUTIONAL LAW—EMINENT DOMAIN—PUBLIC USE.—The Massachusetts Senate requested the opinion of the state Supreme Court as to whether a city widening a highway could take additional land ad-

joining to sell subsequently to private persons at full value, such taking being necessary to promote the industrial welfare of the city. *Held,* the city could not take the additional land. *In re Opinion of the Justices* (Mass. 1910) 91 N. E. 578.

While the determination of the legislature is conclusive both as to the necessity of exercising the power of eminent domain, *Hartwell* v. *Armstrong* (1854) 19 Barb. 166; *contra, Ryerson* v. *Brown* (1877) 35 Mich. 333, and as to the extent of its exercise, *U. S.* v. *Gettysburg Electric R'y. Co.* (1896) 160 U. S. 668, the question whether the taking is for a public use is a purely judicial one. *Coster* v. *The Tide Water Co.* (1866) 18 N. J. Eq. 54. In their efforts to define public use some courts consider the term as synonymous with public welfare, upholding the grant of eminent domain to private enterprises whose advancement is deemed by the legislature essential to the material prosperity of the community, *Hand Gold Mining Co.* v. *Parker* (1877) 59 Ga. 419, a doctrine which has been held not to violate the Fourteenth Amendment of the Federal Constitution. *Strickley* v. *Highland Boy Gold Mining Co.* (1905) 200 U. S. 527. Since every improvement in some degree advances the public welfare, this doctrine presents to the court, in determining the question of public use, the alternative of reviewing in effect the legislative conclusion as to the expediency of the particular enactment, *Hand Gold Mining Co.* v. *Parker supra,* or of regarding the declaration of the legislature as conclusive, thus practically removing all limitation from the legislative exercise of eminent domain. *Cozard* v. *Hardwood Co.* (1905) 139 N. C. 283. Accordingly, the more conservative jurisdictions require that some definite right to the use of property sought to be condemned shall result to the public or some specified portion thereof; *Matter of Appl'n of E. B. W. & M. Co.* (1884) 96 N. Y. 42; *Sholl* v. *German Coal Co.* (1887) 118 Ill. 427; and a like construction has been put upon the term where the taxing power was involved. *Lowell* v. *City of Boston* (1873) 111 Mass. 454; *Opinion of the Justices* (1892) 155 Mass. 498. The court in the principal case reaches a conclusion supported by the better considered cases.

CONSTITUTIONAL LAW — IMPAIRMENT OF CONTRACT — NON-EXCLUSIVE FRANCHISE.—A borough ordinance granted the plaintiff company the right to construct and operate waterworks within the borough. The company accepted the ordinance; and constructed their plant. An action was later brought by the Company to restrain the borough from building a competing plant. *Held,* three judges dissenting, the borough had impliedly contracted not to build competing works of its own, so long as the company furnished a suitable supply. *Penn. Water Co.* v. *City of Pittsburg* (Pa. 1910) 75 Atl. 945.

The grant of an exclusive franchise necessarily involves an agreement not to grant a competing franchise, and a breach of this agreement impairs the obligation of the contract within the prohibition of the Federal Constitution. *McLeod* v. *Savannah etc. Co.* (1858) 25 Ga. 445. But the grant of a non-exclusive franchise does not imply any contract not to grant a competing privilege; *Bienville Water Supply Co.* v. *Mobile* (1899) 95 Fed. 539; for, according to the rule that grants in derogation of the public right must be strictly construed against the grantee, *Knoxville Water Co.* v. *Knoxville* (1905) 200 U. S. 22, all rights not expressly granted are deemed reserved, *Skaneateles Waterworks Co.* v. *Skaneateles* (1901) 184 U. S. 354, including the power to grant competing franchises. *Syracuse Water Co.* v. *Syracuse*

(1889) 116 N. Y. 167. And since the degree of injury caused to the first grantee by a grant of a competing privilege is in this connection immaterial, it has properly been held that there is no more basis, solely because of the greater damage municipal competition would cause, for implying a contract that the municipality will not itself compete than that it will not grant a private company competing privileges. *Colby Univ.* v. *Canandaigua* (1889) 96 Fed. 449. The court in the principal case, so far as it bases its conclusion on an attempted distinction between municipal and private competition, seems to ignore the authority of the better considered cases. Its decision may, however, be supported on the accepted interpretation of a local statute.

CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACT—PROTECTION OF REMEDIES.—During the pendency of an action in which the plaintiff, a creditor of an insolvent corporation, was seeking to recover from the defendant, a stockholder therein, the unpaid balance on its stock subscription, the state legislature passed an act, operating retrospectively, providing that a bill in equity should be the exclusive remedy for the enforcement of such liability. Prior to the passage of this act the plaintiff was entitled to a several action. *Held,* the act was not in violation of the contract clause of the Federal Constitution. *Pittsburg Steel Co.* v. *Baltimore Equitable Society* (Md. 1910) 77 Atl. 255. See Notes, p. 654.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—POLICE POWER.—The defendant was indicted under N. Y. Consol. Laws c. 31 Art. 8 forbidding employment of block signal telegraphers for more than eight hours a day. The Act of Congress of March 4, 1907, to become effective March 4, 1908, forbids employment of the same class for more than nine hours. The alleged offence occurred in August, 1907. *Held,* the defendant was liable. *People* v. *Erie Ry.* (1910) 198 N. Y. 369.

For a discussion of the principles involved in this case, see 9 COLUMBIA LAW REVIEW 66.

CONSTITUTIONAL LAW—TAX EXEMPTIONS—POWER TO GRANT.—A railroad had a contract exemption from taxation. The state constitution, adopted subsequently, prohibited the granting of exemptions from taxation. On foreclosure under a mortgage, all the property, rights and franchises of the railroad company were bought in by the state and later granted by it to the defendant, who resisted payment of taxes. *Held,* the grant by the state did not carry the exemption to the grantee. *Great Northern Ry. Co.* v. *Minnesota* (U. S. 1910) 30 Sup. Ct. Rep. 344. See Notes, p. 663.

CORPORATIONS—ELECTIONS—LEGALITY OF VOTING TRUSTS.—To prevent the control of a bank passing into the hands of one individual to the necessary detriment of the bank, the majority shareholders assigned their stock to three trustees for a period of fifteen years with authority to vote the same at annual corporation meetings as they deemed best for the welfare of the bank. *Held,* one judge dissenting, the agreement was void *per se* as against public policy. *Bridgers* v. *First Nat. Bank* (N. C. 1910) 67 S. E. 770. See Notes, p. 658.

COURTS—EFFECT OF OVERRULING DECISION—CONSTITUTIONALITY OF CRIMINAL STATUTE.—The state supreme court held a statute prohibiting the sale of liquor unconstitutional, and later overruled its previous holding. In the meantime the defendant committed the acts forbidden by the statute, under which he was later prosecuted after the overruling decision. *Held,* the defendant could not be prosecuted under the statute. *State* v. *O'Neil* (Ia. 1910) 126 N. W. 454.

On the commonly accepted theory that a decision is merely declaratory of existing law, 1 Bl. Comm. 70, an overruling decision has properly a retroactive effect in subsequent cases. 9 COLUMBIA LAW REVIEW 163. Under the opposing doctrine that the court rendering such a decision in effect announces a new rule of law, Salmond, Theory of Jud. Precedents, 16 L. Q. R. 376, the decision must of necessity affect retrospectively the rights of the parties before the court; and no reason is seen for confining its retroactive effect to that case. However explained, the general rule is well established. A well defined exception is recognized in cases involving the interpretation and constitutionality of statutes; and contracts based upon the overruled construction, as well as property rights which have vested under such contracts, are exempted from the application of the construction subsequently adopted. *Gelpcke* v. *Dubuque* (1863) 68 U. S. 175; *Haskett* v. *Maxey* (1892) 134 Ind. 182. The courts, however, have not generally extended the exception to criminal statutes. In *State* v. *Bell* (1904) 136 N. C. 674, the court attempted to overrule its former construction of such a statute, while refusing to apply the new construction to the defendant at bar, apparently oblivious to the principle that a decision is a binding precedent solely by virtue of its application of a rule of law to the facts of the case before it. Salmond, Theory of Jud. Precedents, *supra.* Yet there is no greater hardship involved in applying the new rule of construction to any other offender whose acts were committed, as those in the principal case, before its adoption. In the absence of express authority in point, it is submitted that the principal case should have followed the orthodox doctrine that a statute finally held to be constitutional was in point of law constitutional from the time of its enactment; and hence that the defendant was guilty.

CRIMINAL LAW—DOUBLE JEOPARDY—PERJURY AS TO GUILT IN FIRST TRIAL.— The defendant was indicted for embezzling letters, and on his testimony that he had not read a purported confession signed by him, was acquitted. He was then indicted for perjury in giving this evidence. The prosecution introduced evidence of the acts of embezzlement, and the defendant excepted. *Held,* the evidence was inadmissible. *Chitwood* v. *U. S.* (C. C. A. 8th C. 1910) 178 Fed. 442.

Acquittal or conviction is a bar to a subsequent indictment for any offence of which the accused could have been convicted on the first indictment. 2 Russell, Crimes 1984. But where, as in the principal case, such identity in law does not exist, the defence of double jeopardy has no application. *Comw.* v. *Roby* (1832) 12 Pick. 496. A result similar to that in the principal case has been reached under the principles of *res adjudicata* in *U. S.* v. *Butler* (1885) 38 Fed. 498, and *Cooper* v. *Comw.* (1899) 106 Ky. 909. However, *res adjudicata* is not properly applicable to criminal cases, *State* v. *Caywood* (1895) 96 Ia. 367, where its function is supplied by the pleas of *autrefois acquit* and *autrefois convict,* which are combined in the

modern plea of double jeopardy. Starkie, Cr. Pl. 349. And although estoppel by verdict operates in criminal cases against the defendant where there has been a former conviction, it is not regarded as available in his favor in case of a former acquittal. *See Reg.* v. *Inhabitants of Haughton* (1853) 1 El. & Bl. 501; *Rex* v. *Inhabitants of St. Pancras* (1794) 1 Peake N. P. 220. There seems, therefore, to be no sound principle upon which a verdict of acquittal can be considered conclusive of the facts alleged in the first indictment upon a trial for a subsequent offence; *State* v. *Caywood, supra; Hutcheson* v. *State* (1894) 33 Tex. Cr. 67; and the evidence in the principal case should have been admitted.

CRIMINAL LAW—EMBEZZLEMENT—CONVERSION OF PROCEEDS OF CHECK BY BROKER.—A broker, authorized to buy specific stock, ordered it from a correspondent, notified the customer that it had been bought, and deposited a check he received in full payment to his firm account. The stock was never taken up from the correspondent, and although practically insolvent, the broker used the proceeds of the check to pay his debts. *Held,* the broker was guilty of embezzlement. *People* v. *Meadows* (N. Y. 1910) 92 N. E. 128.

Although embezzlement is a purely statutory crime, *Comw.* v. *Stearns* (Mass. 1841) 2 Met. 343, it may be generally defined as the fraudulent conversion of the property of another by one who holds it as a fiduciary. 1 Wharton, Criminal Law §§ 1009, 1049. That a broker is often such a fiduciary is well established. *Comw.* v. *Cooper* (1880) 130 Mass. 285. But when he is authorized to mingle the money received with his own funds he has been considered a debtor, and therefore not guilty of embezzlement for a subsequent appropriation, *People* v. *Thomas* (N. Y. 1903) 83 App. Div. 226, a proper result, since no particular money was held for the principal. But see 2 Bishop, Criminal Law § 370. If a criminal intent existed at the time of the deposit, the authority given by the principal would apparently be nullified, *U. S.* v. *Sander* (U. S. C. C. 1855) 6 McLean 598, and the fiduciary held guilty. *Leonard* v. *State* (1879) 7 Tex. App. 417, 444. Since no such facts appear in the principal case, it is unsound if the broker had authority to mingle. On the other hand, when the fiduciary is expected to keep the money in a separate fund and does so keep it, he is deemed a trustee or a bailee, *People* v. *Civille* (N. Y. 1887) 44 Hun 497, and is held to be guilty upon a fraudulent conversion. *Comw.* v. *Tuckerman* (Mass. 1857) 10 Gray 173, 188. So if the agent, though not authorized to mingle the money with his own, does so with criminal intent, he is usually considered guilty. *State* v. *Cunningham* (1899) 154 Mo. 161, 174. Obviously this intent must exist at the time of the co-mingling, and therefore the principal case is unsound even if, as held by the lower court, 136 App. Div. 226, the agent was not authorized to mingle the proceeds. However, it follows the tendency of the New York courts shown in *People* v. *Birnbaum* (N. Y. 1906) 114 App. Div. 480, and *People ex rel. Zotti* v. *Flynn* (N. Y. 1909) 135 App. Div. 276.

DAMAGES—EMINENT DOMAIN—RAILWAYS IN STREETS.—An abutting owner who held the fee of the street sued to recover for the construction and operation of an electric street railway in front of his premises. *Held,* the measure of damages was the market value of the premises taken and the damages to the residue, including injuries

caused by noise and vibration. *Rasch* v. *Nassau Electric R. R. Co.* (N. Y. 1910) 43 N. Y. L. J. 37. See Notes, p. 656.

DIVORCE—DESERTION—WHAT CONSTITUTES.—The defendant by threats against the plaintiff's life drove him from home. After four years separation the plaintiff brought an action for divorce on the ground of desertion. *Held,* the plaintiff was entitled to a divorce. *Hudson* v. *Hudson* (Fla. 1910) 51 So. 857.

The granting of divorce on the ground of desertion is a comparatively modern doctrine and wholly statutory. To constitute desertion under the statute one spouse must effectuate the intention of causing the cohabitation to cease, *Bailey* v. *Bailey* (Va. 1871) 21 Gratt. 43, and he must do so without the consent of the other spouse. Bishop, Mar., Div. & Sep. §§ 1670, 1671. The cessation of cohabitation, therefore, because of the illness of either spouse is not such desertion as is contemplated by the statute. *Keech* v. *Keech* (1868) L. R. 1 P. & D. 641. The spouse leaving the marital domicile is *prima facie* the deserter and the burden is upon him or her to show that the departure was justified. *Starkey* v. *Starkey* (1870) 21 N. J. Eq. 135. Where one spouse justifies the other in leaving the marital home the one remaining is, of course, deemed the deserter, *Morris* v. *Morris* (1852) 20 Ala. 168; *Waltermire* v. *Waltermire* (1888) 110 N. Y. 183, and the one driven from home may, after the lapse of the statutory period, maintain an action for divorce on the ground of desertion. *James* v. *James* (1878) 58 N. H. 266. Only such conduct however will justify one spouse in leaving the other as would constitute grounds for granting a divorce for desertion, *Fritz* v. *Fritz* (1891) 138 Ill. 436, the courts applying perhaps the principles of the old action for the restoration of conjugal rights. See *Grove's Appeal* (1860) 37 Pa. St. 443. To allow the maintenance of an action for divorce on the ground of desertion for any other reason would be to extend the grounds for divorce by judicial interpretation. *Laing* v. *Laing* (1870) 21 N. J. Eq. 249. The court in the principal case seems to have overlooked this consideration, upon the application of which the soundness of its decision must rest.

DIVORCE—EFFECT OF DECREE—CONTRACT TO REMARRY MADE DURING TIME FOR APPEAL.—A statute imposed on any divorcee remarrying within the time allowed for appeal from a decree, the penalties of bigamy. Within such time one Dewey contracted to marry the defendant after the expiration of such time, and to convey to her certain lands, her title to which was attacked by an adverse claimant. *Held,* the contract was valid. *Leininger Lumber Co.* v. *Dewey* (Nev. 1910) 126 N. W. 87.

It is well settled that a promise to marry conditioned on obtaining a divorce is void as against public policy. 1 Bishop, Marriage, Divorce and Separation 193; *Noice* v. *Brown* (1876) 38 N. J. L. 228. Hence the fallacy of the argument employed in the principal case, that what one may lawfully do in the future he may now contract to do. *Noice* v. *Brown supra.* Remarriage by the defeated party after a decree but during the time for appeal has been held a waiver of the right of appeal. *Stevens* v. *Stevens* (1875) 51 Ind. 542. But a remarriage by the successful party during this period, which obviously could not operate as a waiver, is deemed contrary to the policy of the law, as evidenced by such statutes as that in the principal case. *Eaton* v. *Eaton* (1902) 66 Nev. 676, 681. Although most

courts hold that the decree wholly dissolves the marriage, yet during this time the parties for certain purposes are certainly not as if single, *Eaton* v. *Eaton supra,* for if the decree is reversed or vacated they need not remarry, but remain married. *Estate of Wood* (1902) 137 Cal. 129 (dissenting opinions). The promise in the principal case while presumably to be interpreted as conditioned on no reversal being obtained, is yet open to all the objections urged against such promises made before divorce, even though in less degree. Such contracts would seem therefore to be contrary to public policy. See *Haviland* v. *Halsted* (1866) 34 N. Y. 643.

EQUITY—CLOUD ON TITLE—NECESSITY OF POSSESSION TO MAINTAIN ACTION.—The defendant railroad, having the power of eminent domain, had occupied a strip of land through the plaintiff's property, which was not otherwise in the actual possession of anyone. The extent of such occupancy was in dispute. The plaintiff brought suit to remove the cloud on his title. *Held,* since the statutory action for compensation would either concede the greater occupancy or risk an inadequate recovery, equity had jurisdiction. *Stuart* v. *Union Pac. R. Co.* (1910) 178 Fed. 753.

The equity jurisdiction to remove a cloud on title was early invoked in favor of an owner in possession, *Petit* v. *Shepard* (N. Y. 1835) 5 Paige 493, in order that the marketability of the property should not be injuriously affected. 9 COLUMBIA LAW REVIEW 257. This jurisdiction has been readily extended to embrace all cases within the reason of the rule, and, provided the plaintiff out of possession have such an interest in the property as would be injured by the continuance of the cloud, his bill may generally be maintained where for any reason he has not a complete and adequate legal remedy. Accordingly, where an action of ejectment will not lie because the plaintiff, being a reversioner, *Keyes* v. *Ketrick* (1903) 25 R. I. 468, or remainderman, *Worthington* v. *Miller* (1901) 134 Ala. 420, has no right to immediate possession, or as a mere warrantor is utterly without possessory right, *Pier* v. *Fond du Lac Co.* (1881) 53 Wis. 421, or because neither party is in possession; *Christy* v. *Springs* (1902) 11 Okl. 710; *Heppenstall* v. *Leng* (1907) 217 Pa. St. 491; or where, though the plaintiff is entitled to immediate possession, a recovery in ejectment would leave the cloud still existing, *Kruczinski* v. *Neuendorf* (1898) 99 Wis. 264, the jurisdiction of equity may be invoked to remove the cloud. And while this jurisdiction has been limited in some states by statute, *Randle* v. *Daughdrill* (1904) 142 Ala. 490; *Mackey* v. *Maxin* (1907) 63 W. Va. 14, it has been extended in others so as to render possession wholly immaterial. *Casey* v. *Leggett* (1899) 125 Cal. 664, 672; Neb. Comp. Stat. (1901) c. 73 sec. 57. In the absence of a controlling statute, the principal case presents a broad and liberal application of the general rule.

EQUITY—INJUNCTION—CLEAN HANDS.—Both the plaintiff and defendant were using on adjacent lands devices to increase the natural flow of oil and natural gas from their wells. The plaintiff sued to restrain the defendant's user. *Held,* no injunction would issue. *Ilo Oil Co.* v. *Indiana Natural Gas & Oil Co.* (Ind. 1910) 92 N. E. 1.

Since the application of the doctrine of clean hands involves the denial of all relief, Pomeroy, Eq. Jur. § 397, the court should only apply it where the duty of equity is best performed by leaving

the parties *in statu quo*. Thus it seems to be applicable only where the plaintiff's iniquity has an immediate and necessary relation to the thing sued for; *Dering* v. *Earl of Winchelsea* (1787) 1 Cox Eq. Cas. 318; see also *Otis* v. *Gregory* (1887) 111 Ind. 504, 509; Pomeroy, Eq. Jur. § 399 ; or more definitely, where the plaintiff is seeking to protect himself in or to take advantage of a situation brought about in whole or in part by his previous wrong against the defendant. The maxim that "he who seeks equity must do equity", however, does not imply the forfeiture of the right to relief. It means that the court will only grant the plaintiff's prayer upon his "doing equity" in some matter so related to the relief sought that it may fairly be deemed a prerequisite thereto. Pomeroy, Eq. Jur. § 397; 10 COLUMBIA LAW REVIEW 247. The court having a wide discretion might properly apply this maxim to avoid multiplicity of suits, where, as in the principal case, the two injuries are so identical in character that the same rule of law must be applied to both; see *Comstock* v. *Johnson* (1871) 46 N. Y. 615; and this the court may do of its own motion. *Comstock* v. *Johnson supra; Missouri Guarantee etc. Ass'n.* (1900) 158 Mo. 613, 623. But since the plaintiff's conduct was quite independent of the injury of which he complains, the doctrine of clean hands is inapplicable.

HABEAS CORPUS—PROSECUTION BARRED BY STATUTE—JURISDICTION TO IMPOSE SENTENCE.—The relator, having pleaded guilty to seduction, married the prosecutrix with consent of the court. The statute provides that such a marriage "is a bar to prosecution." Nevertheless, judgment was pronounced. *Held,* three judges dissenting, there was no such utter lack of jurisdiction to impose a sentence as to entitle the plaintiff to relief by habeas corpus. *People* v. *Frost* (N. Y. 1910) 91 N. E. 376.

Although habeas corpus lies only for jurisdictional defects and not to review error, *Ex parte Shaw* (1857) 7 Ohio St. 81; 7 COLUMBIA LAW REVIEW 288, and in favor of one restrained under a void as opposed to a voidable judgment, *Bray* v. *State* (1903) 140 Ala. 712, the greatest difference exists as to what renders a judgment void. *U. S.* v. *Pridgeon* (1894) 153 U. S. 48. Yet this is the only question for consideration. *In re Rolfs* (1883) 30 Kan. 758. Undoubtedly no judgment is valid in the absence of jurisdiction of the person and cause, *Ex parte Schultz* (Pa. 1841) 6 Whart. 269; *Sennott's Case* (1888) 146 Mass. 489, and the weight of modern authority, at least, requires the additional jurisdiction to render the particular judgment; *People* v. *Liscomb* (1875) 60 N. Y. 559; *Ex parte Cox* (1893) 3 Ida. 530; *Nielson, Petitioner* (1888) 131 U. S. 176; the court, that is, must observe those limitations prescribed by common law or statute. *In re Bonner* (1893) 151 U. S. 242. There is justification for the majority opinion in the principal case under the older view of jurisdiction, for it is doubtful if, as the dissenting opinion contended, the statute upon marriage operated to destroy all semblance of jurisdiction of both the person and the cause. Yet assuming this jurisdiction, the result reached cannot be supported under the modern and better view, since the court was powerless to impose the particular sentence. *People* v. *Liscomb supra; Nielson, Petitioner supra; Ex parte Lange* (U. S. 1873) 18 Wall. 163. The dissenting opinion reaches a conclusion sounder and more in consonance with the avowed policy of the New York courts to interpret the habeas corpus act liberally. *People* v.

Liscomb supra. See also note to Koepke *v.* Hill (Md. 1901) 87 Amer. St. Rep. 161; *Ex parte Lucas* (1900) 160 Mo. 218.

INSURANCE—BENEFICIARY OF LIFE POLICY—EFFECT OF BIGAMOUS MARRIAGE.—The plaintiff's husband, one Woodson, deserted her and later married the defendant Mary Woodson without objection by the plaintiff, who thereafter herself married one Blew. Woodson subsequently insured in the defendant association, the policy being made payable to his "wife or heir." After his death the plaintiff sued for the amount of the policy. *Held,* the defendant Mary Woodson was entitled to the benefit. *Woodson* v. *Colored Knights of Honor* (Miss. 1910) 52 So. 457.

Though a bigamous marriage is void, it does not follow that a policy effected by the husband for the benefit of his reputed wife is invalid. *Equitable Ins. Co.* v. *Patterson* (1870) 41 Ga. 338, 365. A beneficiary specifically named, and designated as his wife, can claim the benefit of a policy although she is not his wife by reason of divorce, *Martin* v. *Woodmen* (1903) 111 Ill. App. 99, even if her former husband remarries, *Courtois* v. *Grand Lodge* (1902) 135 Cal. 552, or where the marriage is bigamous, provided the plaintiff married in good faith. *Story* v. *Williamsburg Ass'n* (1884) 95 N. Y. 474; *Maccabees* v. *McAllister* (1902) 132 Mich. 69. But where the beneficiary is not named, good faith is immaterial, *Grand Lodge* v. *Elsner* (1887) 26 Mo. App. 108, and since the word "wife" alone is unambiguous, evidence of deceased's intention in using the word is inadmissible, and the only one who can claim under a policy so phrased is the legal wife. *Bolton* v. *Bolton* (1882) 73 Me. 299. Nor will the plaintiff's misconduct deprive her of her rights under the policy. *Shamrock Society* v. *Drum* (1876) 1 Mo. App. 320. On the other hand, if good faith is lacking in the beneficiary, she cannot claim the benefit of a policy though named therein. *Keener* v. *Grand Lodge* (1889) 38 Mo. App. 543. While acquiescence may estop the first wife to attack the validity of a foreign divorce, *Richardson's Case* (1889) 6 Pa. Co. R. 653, or may raise the presumption of such a divorce, *Scott's Adm'r* v. *Scott* (Ky. 1904) 77 S. W. 1122, no divorce was alleged in the principal case, and the court does not indulge the presumption. The lawful wife should therefore have recovered.

INSURANCE—STANDARD FIRE POLICY—CHANGE OF INTEREST.—After a standard fire policy had been issued to the plaintiff, he agreed to sell the insured premises, the contract entitling the vendee to immediate possession, and being conditioned upon a determination in favor of the plaintiff of a pending action concerning his property. *Held,* it was immaterial that the contract was conditional, the plaintiff having given up his own sole and unconditional ownership so as to create a change of interest. *Gorsch* v. *Niagara Fire Ins. Co.* (1910) 123 N. Y. Supp. 877.

The provision as to sole and unconditional ownership in a standard policy has continually been construed to mean that insured's interest must be such that in case of loss the substantial burden will fall upon him, regardless of the technical character of his title. Richards, Insurance (3rd ed.) § 259; *Hartford Fire Ins. Co.* v. *Keating* (1897) 86 Md. 130. A mere executory agreement to sell, without transfer of possession, is not considered such a change of interest as invalidates a policy; *National Fire Ins. Co.* v. *Three States Lumber Co.*

(1905) 217 Ill. 115; while the alienation clause of a policy is generally held to be violated where the vendee, pending the fulfillment of a binding contract to sell, takes possession and actual control of the property. *Gibb* v. *Fire Ins. Co.* (1894) 59 Minn. 267. The fact that the contract in the principal case was conditional is therefore most material. Since the contingency on which the vendee's rights depended was unfulfilled at the time of the loss, the contract was unenforceable in equity. Hence, no equitable interest having passed, the vendor must bear the loss. Fry, Specific Performance (3rd Amer. ed.) § 893; 10 COLUMBIA LAW REVIEW 274. There was therefore no such change of interest as should have invalidated the plaintiff's policy.

LABOR UNIONS—INTERFERENCE WITH EMPLOYERS' BUSINESS—INJUNCTION.—The employees of a waist manufacturer struck to prevent the employment of non-union labor and the union threatened to call out its members in the employ of other waist manufacturers, who had already regulated similar disputes, if they continued to supply the delinquent employer with waists. *Held,* the plaintiff was entitled to an injunction. *Schlang* v. *Ladies' Waist Makers' Union* (1910) 124 N. Y. Supp. 289. See Notes, p. 652.

LIMITATION OF ACTIONS—PAYMENT ON BARRED NOTE—REVIVAL OF MORTGAGE SECURITY.—The payee sued on a promissory note and to foreclose the mortgage security. Subsequent judgment lienors pleaded the Statute of Limitations. The note had been revived by the payment of interest. *Held,* the mortgage was also revived. *Clark* v. *Grant* (Okla. 1910) 109 Pac. 234.

Although in the majority of American jurisdictions a mortgage is considered but a lien security for the principal obligation, the debt, Jones, Mortgages § 58; 10 COLUMBIA LAW REVIEW 252, yet generally the statutory bar of the debt does not affect the mortgage. See note, *Kulp* v. *Kulp* (Kan. 1893) 21 L. R. A. 550; Jones, Mortgages § 1204. In some states the mortgage is barred with the debt by statute, *Duke* v. *State* (1892) 56 Ark. 485, while in others where the mortgage is deemed to give only a contract lien upon the land, a like result is reached because of the express extension of the Statute to courts of equity, *Lord* v. *Morris* (1861) 18 Cal. 482, or by virtue of an extension implied from the consolidation of equity and law; *Harris* v. *Mills* (1862) 28 Ill. 44; and this may occur where the mortgage conveys legal title. *Perkins* v. *Sterne* (1859) 23 Tex. 561. Another reason given is that the mortgage is but an incident of the debt, which must abide the fate of the principal. *McNanaman* v. *Hinchley* (1901) 82 Minn. 296; *Schifferstein* v. *Allison* (1888) 123 Ill. 662. This reason would seem insufficient to explain the rule, for with this theory of the relation of mortgage and debt a different result is often reached on the ground that the mortgage as a specialty is governed only by the statutes applicable to specialties, *Story* v. *Doris* (1899) 110 Ga. 65, or that the relief sought being purely equitable, equity will not apply the analogy of the law. *Michigan Co.* v. *Brown* (1863) 11 Mich. 265. Although it might seem preferable to insist that a mortgagor in equity should do equity to unburden his land, *Balch* v. *Onion* (Mass. 1849) 4 Cush. 559, yet having determined as in the principal case that the mortgage is barred with the debt, logic demands that when the statutory defense to the debt is removed the mortgage

should also be revived, as the principal case correctly held. *Johnson* v. *Johnson* (1884) 81 Mo. 331; *Allen* v. *O'Donald* (1886) 28 Fed. 346.

MASTER AND SERVANT—CONTRACTS LIMITING LIABILITY—RAILWAY RELIEF DEPARTMENT.—One of the regulations of a railroad's relief department provided that the acceptance of any benefit for an injury should operate as a release of all claims arising out of such injury. *Held,* the regulation was void as against public policy. *Barden* v. *Atlantic Coast Line R. R.* (N. C. 1910) 67 S. E. 971.

While it is contrary to public policy for a servant to release a master from all liability for future injuries, *Johnston* v. *Fargo* (1906) 184 N. Y. 379; 2 COLUMBIA LAW REVIEW 327, he may release a claim after the injury has been incurred. *White* v. *Richmond & Danville R. Co.* (1892) 110 N. C. 456. The contract made by a railroad employee upon becoming a member of a relief department is not of the first kind, *Johnson* v. *Phila. & Reading R. R.* (1894) 163 Pa. St. 127, but is rather a conditional contract of release. *Shaver* v. *Penn. Co.* (1896) 71 Fed. 931. Since after the injury the employee may elect to sue or to accept the benefit of the department, *Petty* v. *Brunswick & Western R. Co.* (1890) 109 Ga. 666, and his employer is not released from his common law liability until such acceptance, *Eckman* v. *Chicago, B. & Q. R. R. Co.* (1897) 169 Ill. 312, 320, the regulation is not deemed void at common law, *Pittsburg C. C. & St. L. R. Co.* v. *Moore* (1898) 152 Ind. 345, 351, nor under statutes declaring void all contracts releasing employers from liability. *P. C. C. & St. L. Ry. Co.* v. *Cox* (1896) 55 Ohio St. 497, 509. In fact, such a department is considered beneficial to the employee, as it gives him relief in cases where the master would not be legally responsible. *Hamilton* v. *St. Louis, K. & N. W. R. Co.* (1902) 118 Fed. 92. Further, its maintenance by a railroad is held not to be within the definition of insurance in regulative statutes, *Beck* v. *Penn. R. R. Co.* (1899) 63 N. J. L. 232, 240, nor *ultra vires. State ex rel. Sheets* v. *P. C. C. & St. L. R. Co.* (1903) 68 Ohio St. 9. There is sufficient consideration for the contract, as the railroad guarantees the relief. *Chicago, B. & Q. R. Co.* v. *Bell* (1895) 44 Neb. 44. The principal case, though difficult to support on principle, has the authority of one decided case. *Miller* v. *Chicago, B. & Q. R. Co.* (C. C. 1894) 65 Fed. 305; but see *Chicago, B. & Q. R. Co.* v. *Miller* (C. C. App. 1896) 76 Fed. 439.

MASTER AND SERVANT—SAFE PLACE TO WORK—VOLUNTARY USE OF UNSAFE PASSAGEWAY.—The plaintiff was injured while using an unsafe passageway which was in habitual use to the knowledge of the defendant's officers, although the defendant had provided a safe way. *Held,* the defendant was negligent because of its acquiescence in the dangerous practice. *Reynolds* v. *Seneca Falls M'f'g. Co.* (1910) 122 N. Y. Supp. 797.

The master's duties of furnishing a safe place to work and of making rules are closely connected. Burdick, Torts 160. Thus a servant injured through either a failure to use the safe place or instrumentality or a violation of a rule cannot recover. *Francis* v. *Railroad* (1892) 110 Mo. 387; *Connors* v. *Merchants' Co.* (1904) 184 Mass. 466. Since, however, the master is under the further duty of using reasonable means to enforce his rules, *Whittaker* v. *D. & H. Canal Co.* (1891) 126 N. Y. 544, a breach of rules habitually disregarded to his knowledge will not defeat recovery, *Chicago Ry. Co.* v.

Flynn (1895) 154 Ill. 448; *Lowe* v. *Chicago Ry. Co.* (1893) 89 Iowa 420, on the ground that he has impliedly abolished the rules or that his failure to enforce them estops him from predicating contributory negligence from the mere breach thereof. Labatt, Master and Servant § 233. Similarly, the principal case holds the defendant's sanction of the use of the dangerous way equivalent to negligence because its acquiescence charged it with making the passage safe for such a use, either as amounting to an implied invitation, *Hanlon* v. *Thompson* (1896) 167 Mass. 190, or on the ground that it was thereby estopped to deny that it intended such a use. Although a master is originally under no duty to make rules except where necessary to protect employees from the acts of each other, *Doing* v. *N. Y. Ry. Co.* (1897) 151 N. Y. 579, or from the consequences of their own acts by informing them of dangers not patent, *Railroad Co.* v. *Strycharski* (1894) 6 Tex. Civ. App. 555, yet where servants subsequently adopt a dangerous method of work or the improper use of an appliance to the master's knowledge, he must make the method, *Doing* v. *N. Y. Ry. Co. supra,* or appliance safe for the use he has sanctioned. *Hart* v. *Naumburg* (N. Y. 1888) 50 Hun 392. See also *Young* v. *Railroad* (1898) 69 N. H. 356. Hence in the principal case the defendant's failure to make the way safe or to prevent its habitual use was properly held negligent.

OFFICERS—ELIGIBILITY OF WOMEN TO HOLD OFFICE.—The relator, a woman, was elected county treasurer. She sought by mandamus to compel the incumbent to turn over to her the papers, etc. belonging to the office. *Held,* the mandamus would issue, the relator being eligible. *State ex rel. Jordan* v. *Quible* (Neb. 1910) 125 N. W. 619.

A fundamental principle of government in the United States is that of the sovereign power of the people, affected only by self-imposed restrictions. Cooley, Principles of Const. Law 23. In the absence of any restriction, therefore, eligibility to office would seem to be a matter of arbitrary choice on the part of the people. See *White* v. *Clement* (1869) 39 Ga. 232. Such restriction, however, may be found in the common law, where it has been adopted by the particular state, or in constitutional or statutory regulations. From the nature of things offices are provided for by written law. Where provision is made as to eligibility, the qualification of a woman to hold office would be a matter of statutory interpretation, and such interpretation has in general been unfavorable to her. *Atchison* v. *Lucas* (1885) 83 Ky. 451; *Robinson's Case* (1881) 131 Mass. 376; *contra, In re Hall* (1882) 50 Conn. 131. Where no provision is made, there would seem to be no restriction whatever upon eligibility, *Wright* v. *Noell* (1876) 16 Kan. 601; see *Barker* v. *People* (N. Y. 1824) 3 Cow. 686, 703, except in so far as the common law applies, for there is no logical connection between the right to vote for, and the privilege of holding, an office. *Fincklea* v. *Farish* (1909) 160 Ala. 230. The common law however has apparently in no instance denied the eligibility of women, see note, 38 L. R. A. at 215, and has affirmatively recognized her capacity to hold various offices of administrative character, *Olive* v. *Ingraham* (1738) 2 Stra. 1114; *Lady Russel's Case* (1603) 2 Cro. Jac. 17, a limitation seemingly adopted by the modern English cases. *Beresford-Hope* v. *Lady Sandhurst* (1889) L. R. 23 Q. B. Div. 79. The principal case, therefore, was correct in concluding that, in the absence of any restriction upon the choice of the people, a woman was eligible.

OFFICERS—LIABILITY FOR INTEREST ON PUBLIC FUNDS.—A treasurer of the board of levee commissioners failed to account for interest received from deposits of moneys belonging to the board. *Held,* both the treasurer and his sureties were liable to account for this interest. *Adams* v. *Williams* (Miss. 1910) 52 So. 865.

In most jurisdictions a public officer is, according to statutory interpretation, an absolute insurer of the public moneys under his control. *Thompson* v. *Territory* (1900) 10 Okla. 409. Some courts have considered the officer therefore the owner of the money, *Shelton* v. *State ex rel. Comm'rs of Morgan Co.* (1876) 53 Ind. 331, a debtor to the state, *Comw.* v. *Godshaw* (1891) 92 Ky. 433, and hence entitled to keep the interest on money voluntarily deposited by him. *State* v. *Walsen* (1892) 17 Col. 170. The weight of authority however is otherwise. *State* v. *McFetridge* (1893) 84 Wis. 473, 503. In construing statutes regulating the manner in which the officer shall account for the public funds and making it a crime for him to profit by their use, the courts hold that it was not the intention of the legislature to vest title to the funds in the officer, *Eshelberg* v. *Cincin. Board of Education* (1902) 66 Ohio St. 71, and hence that he may not retain interest. *State* v. *McFetridge supra,* 597. The officer has been regarded as a trustee, *U. S.* v. *Mosby* (1889) 133 U. S. 273, 286, or bailee, *Thompson* v. *Territory supra,* 413, subject to extraordinary liability. It has been pointed out that both analogies are false, as the officer has neither title nor the custody of a specific *res. Vansant* v. *State* (1902) 96 Md. 110, 122. His true situation would seem to be that of statutory fiduciary, without strict analogy at common law. *Vansant* v. *State supra.* The conclusion of the principal case is sound on grounds of public policy, *Supervisors of Richmond Co.* v. *Wandell* (N. Y. 1872) 6 Lans. 33, affirmed 59 N. Y. 645, it being undesirable to permit an officer to speculate with public moneys.

PARTNERSHIP—LIMITED PARTNERSHIPS—RIGHT OF SPECIAL PARTNER TO COMPETE.—The general partners of a firm brought action against the special partner for dissolution, on the ground that the latter had become a special partner in a firm carrying on a competing business. *Held,* two judges dissenting, the special partner did not commit a breach of his copartnership obligation. *Skolny* v. *Richter* (N. Y. 1910) 43 N. Y. L. J. No. 93.

It is well established that a general partner may not engage in a competing business, because of the relation of trust and confidence between the partners. Burdick, Partnership 325. Limited partnerships, though entirely the creatures of the legislatures, are nevertheless true partnerships, *Ulman & Co.* v. *Briggs, Payne & Co.* (1880) 32 La. Ann. 655, and the rights and obligations of their members both as between themselves, *Ames* v. *Downing* (N. Y. 1850) 1 Bradford 321, and as to third parties, *Safe Deposit Co.* v. *Cahn* (1906) 102 Md. 530, are regulated by the common law on all points not expressly excepted by statute. While a special partner is not in a relation of trust and confidence to the other members of the firm to the same extent as a general partner, his relation to the other partners is nevertheless a personal one. *Ames* v. *Downing supra.* He is not merely an investor of capital, as is a stockholder of a corporation, but is an owner; this is evidenced by the provisions of statutes giving him, unlike a stockholder, *Matter of Steinway* (1899) 159 N. Y. 250, absolute access to the books of the firm and permitting him to offer advice.

People ex rel. Fabrik v. *Roberts* (N. Y. 1896) 11 App. Div. 310; but see *Artisans' Bank* v. *Treadwell* (N. Y. 1861) 34 Barb. 553. While the case is not free from doubt, it seems that in basing its decision on the premise that a special partner is a mere investor, the court in the principal case departs from an established principle and reaches an erroneous conclusion. See Troubat, Limited Partnerships 513.

PARTNERSHIP—OBLIGATIONS ARISING FROM SALE OF GOODWILL—RIGHT TO SOLICIT OLD CUSTOMERS.—The plaintiff and defendants were co-partners. Two months before the date fixed by the articles of partnership for the dissolution of the firm, the defendants sold the plaintiff the assets and goodwill of the business, intending, however, as the plaintiff knew, to establish a competing business in the same line. This they later did. The plaintiff asked an injunction to restrain the defendants from soliciting the customers of the old firm. *Held,* one judge dissenting, the sale of the goodwill was involuntary because made to avoid dissolution proceedings and the defendants were therefore under no obligation not to solicit. *Von Bremen* v. *MacMonnies* (N. Y. 1910) 122 N. Y. Supp. 1087. See Notes, p. 649.

TORTS—INDUCING BREACH OF ORAL CONTRACT—STATUTE OF FRAUDS.—The defendant induced one Oakes to break his oral contract with the plaintiff for the sale of certain land. The local Statute of Frauds provided that "no action shall be brought" on such contracts. The plaintiff sued in tort. *Held,* he could not recover. *Davidson* v. *Oakes et al.* (Tex. 1910) 128 S. W. 944.

While formerly no recovery could be had for inducing a breach of contract unless such breach were itself actionable, an action of tort now usually lies for interfering with contracts terminable at will, or with an established course of dealing, where its probable continuance is shown. 8 COLUMBIA LAW REVIEW 497. Hence, under the generally accepted doctrine that the Statute of Frauds goes only to the remedy and does not touch the obligation or validity of the agreement, *Leroux* v. *Brown* (1852) 12 C. B. 801; Story, Conflict of Laws (7th ed.) 576, the fact that the contract is unenforceable by virtue of the Statute should not effect the plaintiff's cause of action in tort; for the gist of the action is the wilful interference with the plaintiff's vested rights under his contract. *Walker* v. *Cronin* (1871) 107 Mass. 555. In a jurisdiction which adopts the usual view of the effect of the Statute, *Crane* v. *Powell* (1893) 139 N. Y. 379, a recovery has been allowed against one who procured the breach of an oral contract by means of fraudulent misrepresentation. *Rice* v. *Manley* (1876) 66 N. Y. 82. In view of the principle underlying the right of action, it is submitted that the same result should follow in the absence of fraud.

TORTS—LOSS OF CONSORTIUM—NEGLIGENCE.—The plaintiff's wife died from injuries caused by the defendant's negligence. The plaintiff sued as administrator for her injuries and conscious pain, and personally for his expenses and loss of consortium. *Held,* under *Feneff* v. *Ry.* (1909) 203 Mass. 278, that in view of his recovery as administrator he could not recover for loss of consortium. *Bolger* v. *Boston Elevated Ry. Co.* (Mass. 1910) 91 N. E. 389.

The rights of the husband at common law include not only the services of the wife, but also her society or consortium. *Feneff* v. *Ry. supra; Kujek* v. *Goldman* (1896) 150 N. Y. 176. Hence in cases of per-

sonal injury to the wife, loss of society, as of services, is not merely matter of aggravation, but is part of the husband's cause of action. *Skoglund* v. *Minneapolis St. Ry. Co.* (1891) 45 Minn. 330; *Kirkpatrick* v. *Metropolitan St. Ry. Co.* (1908) 129 Mo. App. 524. Modern statutes have not affected the husband's right to conjugal companionship, *Hey* v. *Prime* (1908) 197 Mass. 474, nor, as interpreted in many states, his right to domestic services. *Southern Ry.* v. *Crowder* (1902) 135 Ala. 417, and cases cited. Loss of consortium is the gist of the action for alienation of affections, *Hermance* v. *James* (N. Y. 1866) 32 How. Pr. 142, and when it is the proximate and natural result of actionable negligence, it would seem to be no less a legal wrong. *Kirkpatrick* v. *Ry. supra; Southern Ry.* v. *Crowder supra.* Hence in view of the husband's undoubted right to recover for the loss to himself accruing before his wife's death, Cooley, Torts (3rd ed.) 470; *Nixon* v. *Ludlam* (1893) 50 Ill. App. 273, his recovery should not be denied where such loss is confined to a deprivation of consortium. Even therefore if the statute in the principal case was properly held to abrogate entirely the husband's right to services, the conclusion reached seems incorrect.

TORTS—MENTAL SUFFERING—CONDUCT NOT ACTIONABLE PER SE.—The defendants, while driving past the plaintiff's house, maliciously addressed the plaintiff with curses and insulting language, by reason whereof the plaintiff was humiliated and suffered mentally to the extent of losing sleep on the following night. *Held,* the defendants' conduct was actionable. *Voss* v. *Bolzenius* (Mo. 1910) 128 S. W. 1.

Mental suffering is ground for compensatory damages whenever directly consequent on an act tortious *per se, Craker* v. *Chi. & N. W. Ry.* (1875) 36 Wis. 657, even though amounting to a mere technical trespass. *Adams* v. *Rivers* (N. Y. 1851) 11 Barb. 390. Thus a common carrier, by reason of its duty to protect passengers from insult by its employees, must compensate a passenger for mental distress resulting from such insult, *Gillespie* v. *Brooklyn Heights Ry.* (1904) 178 N. Y. 347, although such conduct by an ordinary individual would not be actionable. *Bridgman* v. *Armer* (1894) 57 Mo. App. 528. But an act not in itself a breach of legal duty to the plaintiff affords no basis for an action by reason of consequent mental suffering, even though physical pain or illness results therefrom. Burdick, Torts 96; *Nelson* v. *Crawford* (1899) 122 Mich. 466. The absence of proximate cause usually invoked in support of this result seems to be untrue in point of fact; 5 COLUMBIA LAW REVIEW 179; and where the act complained of is wilful and well calculated to bring about the result actually effected, there seems to be good reason for allowing a recovery for such injury. *Wilkinson* v. *Downton* L. R. [1897] 2 Q. B. 57. In the principle case, however, the loss of sleep suffered by the plaintiff can hardly be deemed a physical injury within the scope of this exception; and in the absence of facts establishing a trespass, *Adams* v. *Rivers supra,* the decision is difficult to support.

WATERS AND WATERCOURSES—NAVIGABLE STREAMS—BOUNDARIES OF LANDS UNDER WATER.—The plaintiff claimed land formerly under water to a line drawn approximately at right angles to the thread of the river from the point where his boundary intersected the original shore line. The adjacent owner claimed that the dividing line should be protracted in the same direction to the thread of the river. The

plaintiff filed a bill to quiet title to the parcel in dispute. *Held,* the line should be drawn at right angles. *Campau Realty Co.* v. *Detroit* (Mich. 1910) 127 N. W. 365.

The common law rule that the soil under tideless public rivers belongs to the adjacent riparian proprietor to the thread of the stream, applies to the Detroit River. *Lorman* v. *Benson* (1860) 8 Mich. 18. In dividing the bed between such owners no importance is attached to the quantity of such estates nor to the direction of their side lines. *Miller* v. *Hepburn* (Ky. 1871) 8 Bush. 326. Where the thread of the stream is approximately a straight line, the boundary is generally determined by drawing a line from the upland terminus at right angles to the thread. Where, however, the course is a devious one, the right angle rule may become difficult if not impossible of application. *Groner* v. *Foster* (1897) 91 Va. 650; *Aborn* v. *Smith* (1880) 12 R. I. 370. Further, where the value of riparian land is largely due to its frontage on a navigable stream, the application of this rule would frequently work hardship by giving one riparian owner an unduly large portion of the new shore line at his neighbor's expense. A rule borrowed from the civil law, Denisart, Collection of New Decisions, tit. Atterissement, originally applied in the analogous case of alluvion on a river navigable in fact, *Deerfield* v. *Arms* (Mass. 1835) 17 Pick. 41, and frequently followed to determine the division between riparian proprietors on lakes, coves and banks of tidal rivers, *Johnston* v. *Jones* (1861) 1 Black 209, seem free from these objections. According to this rule, the new river line or thread of the stream is proportioned between adjoining proprietors according to the original frontage of their respective parcels, and the line drawn accordingly. The right angle rule, however, is well settled in the jurisdiction of the principal case. *Clark* v. *Campau* (1869) 19 Mich. 325.